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In The

Supreme Court of the United States

October Term, 1997

FAIR; FIRST ASSEMBLY OF GOD OF VENTURA, JAMES W. WILLIAMS, III; R.H. SMITH FAMILY PARTNERSHIP; LEAVENS RANCHES; ROBERT TOBIAS; STEPHEN TOBIAS; J.D. MCGRATH FARMS; HOWARD AND HOWARD RANCH; DANIEL CAMPBELL; ITO FARMS; THE CONTRERAS FAMILY; and HIJI BROS.,

Petitioners,

v.

CITY OF SAN BUENAVENTURA; and the CITY OF SAN BUENAVENTURA CITY COUNCIL,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Second Appellate District After Denial Of Review By The California Supreme Court

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE PACIFIC JUSTICE INSTITUTE IN SUPPORT OF THE PETITION FOR CERTIORARI

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MOTION OF THE PACIFIC JUSTICE INSTITUTE FOR LEAVE TO FILE BRIEF AMICUS CURIAE FOR THE PETITIONERS

Pursuant to Supreme Court Rule 37.2(b), the Pacific Justice Institute moves for leave to file the attached brief *amicus curiae* in support of the petitioner. Counsel for the petitioners, John H. Findley, has consented to the filing of this brief and that consent has been lodged with the Clerk of this Court. Consent has not been obtained from counsel for the respondents.

INTEREST OF THE AMICUS CURIAE

The Pacific Justice Institute (PJI) is a nonprofit public-interest legal organization formed for the purpose of protecting and promoting the religious freedoms guaranteed by the federal and state constitutions. PJI seeks to represent the interests of individuals who are in danger of having their religious freedoms abridged.

The purpose for this brief is to expound on the last issue advanced in the petition for certiorari: whether a zoning ordinance which prohibits a church from voting in the ballot initiative process used to redesignate its land use is violative of the Free Exercise Clause in conjunction with other hybrid constitutional rights. This *amicus* propounds the view that the ordinance should be evaluated using the strict scrutiny standard of review.

For the foregoing reasons, the Pacific Justice Institute requests that the motion to file the attached brief *amicus curiae* be granted.

DATED: December 18, 1997

Respectfully submitted,

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INTEREST

The interest of amicus is set forth in the preceding motion for leave to file this brief.[1]

OPINION BELOW

The opinion of the Court of Appeal of California, Second Appellate District, Division Six, is not reported. It is reproduced in Appendix A of petitioner's Petition for Writ of Certiorari.

INTRODUCTION

The facts of this case as set forth in petitioner's Petition for Writ of Certiorari and herein adopted, raise the issue of whether the strict scrutiny standard applies to judging the constitutionality of an ordinance that prohibits a church from changing its land-use designation except via a ballot initiative process.

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[1] This brief was prepared *pro bono* for the Pacific Justice Institute.

ARGUMENT

I.

MEASURE I, A CITY ZONING ORDINANCE PROHIBITING A CHURCH FROM USING ANY METHOD OF REDESIGNATING ITS LAND USE EXCEPT THE BALLOT INITIATIVE PROCESS, VIOLATES THE FREE EXERCISE CLAUSE OF THE UNITED STATES CONSTITUTION.

This Court has recognized that "the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts. . . . " *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877 (1990). This includes the assembling with others for the purpose of worship, which is a central tenet of the Christian faith. *Id.* Implicit, therefore, in the assembling together for the purpose of worship, is the church building itself. Measure I, by subjecting Church to a popular vote, has made Church's free exercise of an essential tenet of its faith subservient to the will of the majority. Yet it is undeniable that the very purpose of the Bill of Rights was to protect the "minority" from what has been termed "the tyranny of the majority." In the words of Justice O'Connor:

> "The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities . . . and establish them as legal principles to be applied by the courts." *Id.* at 903 (O'Connor, J., concurring).

The government must remain neutral toward religion. *School District of Abington Tp. v. Schempp*, 374 U.S. 203, 221-22 (1963). But even a regulation neutral on its

face may, in its application nonetheless offend the constitutional requirement for government neutrality if it burdens the free exercise of religion. *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972). Therefore, although zoning is normally a valid exercise of the city's police power, when a community zoning plan or practice infringes upon First Amendment rights, its validity must be scrutinized more closely. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 4 (1974). Mere rationality of the plan is insufficient. The plan must be narrowly drawn in furtherance of a substantial government interest. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981). Measure I, moreover, is distinguishable from normal zoning laws because it, unlike most zoning laws, does not provide equal access to change land use designations to one class of individuals. This is the major distinction which runs it afoul of the Free Exercise Clause. Church's land use is subject to a majority vote in an initiative process in which it may not even participate. This is especially burdensome on minority religions.

In *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court promulgated a four-step constitutional test for free exercise claims. The church must first show that a conduct burdened is motivated by a sincerely held religious belief. Once the church alleges that the free exercise of its faith has been impeded, the burden of proof shifts to the government which must then show some "compelling state interest" to justify the substantial infringement of the church's First Amendment rights. *Id.* at 406.

If the government is able to demonstrate a compelling interest, it still must prove that no alternative forms of regulation would further the interest without infringing the First Amendment rights. *Id.* at 407. This was

refined by the Court in *Thomas v. Review Board, Indiana Employment Security Division*, 450 U.S. 707 (1981), which stated that the government "may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest." *Id.* at 718.

Both courts below failed to apply the proper standard of scrutiny on Measure I and, thereby, denied Church's free exercise claim. The trial court, stating that the ordinance was a valid and neutral law of general applicability applied the standard from *Smith*. The appellate court did not even proceed so far as to misapply the *Smith* case. Rather than delving into the burden placed upon religious rights by the ordinance, it summarily dismissed the free exercise claim as one of pure speculation. Both the federal and state constitutions make it clear that a municipality or county having zoning authority may not exercise its zoning power in a way that prohibits the free exercise of religion. The court, therefore, should have put forth an attempt to evaluate the merits of the ordinance using the strict scrutiny standard.

II.

MEASURE I SHOULD BE ANALYZED USING THE STRICT SCRUTINY STANDARD BECAUSE IT IS NOT A VALID AND NEUTRAL LAW OF GENERAL APPLICABILITY.

In *Smith*, the Court reiterated the consistently held principle that "the right of free exercise does not relieve any individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground

that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).' " 494 U.S. at 879, citing *United States v. Lee*, 455 U.S. 252, 263, n. 3 (1982). In applying this rule, the lower court concluded that Church "cannot allege facts sufficient to show a violation of its right to free exercise of religion because Measure I is a 'valid and neutral law of general applicability.' " App. C-3-4. Church contends, however, that the rule established under *Smith* should not be applied to this case, since Measure I is neither "neutral" nor "generally applicable." And, as this Court has recognized:

> "Neutrality and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993).

If, therefore, it can be shown that the elements of "neutrality" and "general applicability" are absent in Measure I, this court should apply the test set forth in *Sherbert*.

1.

Measure I is not "neutral"

Although it can be said that Measure I possesses the requisite facial neutrality (in that it does not specifically prohibit religious practice) this court has long recognized that facial neutrality does not end the inquiry:

> "Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause 'forbids subtle departures from neutrality, . . . ' " 508 U.S. 520, 533 (1993); *citing, Gillette v. United States*, 401 U.S. 437, 452 (1971).

The impact of Measure I is far from neutral and significantly burdens religious free exercise by making an essential tenet of Church's doctrine (providing a place of worship for its growing congregation) contingent upon a popular vote of non-members, some of whom are hostile to the teachings of the Christian faith.

Webster defined neutral as "indifferent; having no bias in favor of either side." An American Dictionary of the English Language 22 (1828). Measure I, however, is biased in favor of one of two classes of people (those who live within the city limits and may vote versus those in the unincorporated portion of the county who are not permitted to vote) and is biased in favor of one of two classes of property (parcels not designated as "Agricultural" over those designated "Agricultural Use"). AA 11.

2.

Measure I is not "generally applicable"

Measure I is not "generally applicable," in that it does not apply to any and all, generally, such as the criminal statute which was the subject of *Smith*. In *Smith*, members of the Native American Church had their employment terminated as a result of their sacramental use of peyote. They were denied unemployment benefits

and sued the State of Oregon, claiming that the state's drug law of "general applicability," violated the Free Exercise Clause.

Unlike Measure I, which discriminates against an entire class of individuals, the Oregon drug law did not target the Native American Church, nor did it treat the illegal use of peyote by members of the Native American Church differently than the use by any other persons. Thus, this Court found Oregon's drug law, being both neutral and generally applicable, constitutional:

> "Because respondents' ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny respondents' unemployment compensation when their dismissal results from use of the drug." 494 U.S. at 890.

Another example of "generally applicable" laws, recognized by this court as constitutional despite claims of violation of the Free Exercise Clause, are federal tax laws. Such has been this Court's holding even against "those citizens who believe support of organized government to be sinful." *Id.* at 878. As this Court has recognized: "[T]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." *United States v. Lee*, 455 U.S. 252, 260 (1982). In other words, this Court has long recognized that to allow people to divest themselves from the general application of the tax law would create a slippery slope, thus they apply to all without exception.

Measure I, in contrast, presents no neutral and general application. For example, suppose there are two county citizens: "A," who resides within the city limits, and "B," who lives in the unincorporated portion of the county, and both A and B own property designated "Agricultural." Under the dictates of Measure I, A not only possesses the ability to change the designation of his property, he can also vote to prevent B from changing his. B, on the other hand, can do neither, being completely shut out of the political process. By virtue of his residence, B has been made subservient to A. As to B, the law is neither neutral nor generally applicable. Understanding that B is a church and can only change its land designation when those similarly situated to A approve of the change, Measure I forces an infringement upon Church's free exercise of religion. Under these circumstances, this Court has been compelled to require strict scrutiny:

> "A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the command of the First Amendment, a law restrictive of religious practice must advance " 'interests of the highest order' " and must be narrowly tailored in pursuit of those interests." 508 U.S. at 546, *quoting, McDaniel v. Paty*, 435 U.S. 618, 628 (1978).

Under such a test, Measure I must fail, since it neither promotes "interests of the highest order," nor is it "narrowly tailored in pursuit of those interests."

III.

MEASURE I SHOULD BE ANALYZED USING THE STRICT SCRUTINY STANDARD BECAUSE IT PLACES A BURDEN ON THE FREE EXERCISE OF RELIGION IN CONJUNCTION WITH BURDENING OTHER CONSTITUTIONAL RIGHTS.

Even if Measure I were determined to be a neutral law of general applicability, strict scrutiny is the proper standard to consider its constitutionality. Church is not trying to exempt itself from all zoning regulations. "But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general application." 406 U.S. at 220. In *Smith*, the Court clearly stated that the First Amendment may bar the application of a neutral, generally applicable law to religiously motivated action when the law burdens the free exercise of religion in conjunction with another constitutionally protected right. 494 U.S. at 881; *see also City of Boerne v. P.F. Flores*, ___ U.S. ___ , 117 S. Ct. 2157, 2161 (1997). As discussed above, the ordinance places an unconstitutional burden on Church's free exercise of religion. Measure I inhibits several hybrid constitutional rights as well.

Cantwell v. Connecticut, 310 U.S. 296, was one of the cases listed in *Smith* as an example of a hybrid claim. 494 U.S. at 881. The unconstitutional licensing system in *Cantwell* required a certificate given by a governmental process which appraised the facts, exercised judgment, and formed an opinion on the authenticity of the plaintiff's

religion. 310 U.S. at 307. This is precisely the effect of Measure I, which gives this same type of arbitrary control to the voting public. "The power to regulate for the protection of society must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Id.* at 304. Measure I places a substantial burden on the hybrid constitutional right of a communicative nature which is Church's inability to vote.

A second cited example of a hybrid right was *Murdock v. Pennsylvania*, 319 U.S. 105 (1943). 494 U.S. at 881. In *Murdock* the Court held that a tax on soliciting books was a prior restraint of speech and religion. 319 U.S. at 114. It was not considered important that the law was "nondiscriminatory" and applied to all solicitors. It was enough that it served to restrain a protection afforded by the First Amendment. *Id.* at 115. Measure I serves to prohibit Church's exercising a constitutional right to vote. Regardless of the fact that other secular entities are also prohibited from voting, higher scrutiny of Measure I is required because this prohibition is in conjunction with a free exercise claim.

Another hybrid right violated by Measure I is the Establishment Clause. The Court has stated that a particular zoning regulation on its face or as applied, may be violative of the Establishment Clause. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 (1982). In *Larkin* the Court invalidated a state statute that delegated liquor license issuance veto power to churches within 500 feet of the business applying for the license. Although the law had a secular purpose, excessive entanglement was present because religious groups became involved in the governmental process. Measure I affects religious practices by

impermissibly entangling the electorate in the affairs of the church. Furthermore, religious groups with land designated as "agricultural" will be completely disfranchised unless they become actively and personally involved in the initiative process.

Additional hybrid rights discussed in the Petitioner's Writ of Certiorari include those of equal protection and due process as guaranteed under the Fourteenth Amendment. Church is not attempting to perform an act that is a concoction of an individual's peculiar religious belief. Church is not attempting to circumvent a neutral and generally applicable criminal law that is intended to ensure public peace or safety. A church building provides shelter and aid and performs the centuries-old tradition of helping those in need. It also provides a forum for people to assemble and practice their religious beliefs. In this manner, Measure I burdens the traditional and conventional practices of almost all religions. There is no need for the Court to determine whether this practice is central to a particular religion because it is a traditional and universally accepted right.

Another constitutionally protected exercise of Church's First Amendment rights is communicating its religious message to the "unchurched" people. The church building serves as a vehicle for this communication. But the people, before they have heard Church's message, may not be amenable to land use redesignation. Therefore, the very people which Church is attempting to reach may be the hostile voting majority who will inhibit the Church's free exercise. Since Measure I does burden the free exercise of religion in conjunction with other constitutional

protections, the standard from *Smith* is inapplicable and this Court should apply the test set forth in *Sherbert*.

CONCLUSION

For all the reasons above the Court should grant certiorari and review the decision of the California Court of Appeal below.

Respectfully submitted,

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